

82 6419
NO.

RECEIVED

MAR 19 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

Thomas Robert Lacher,

Appellant,

v.

City of Bemidji,

Appellee.

On Appeal from the Supreme Court of Minnesota

Jurisdictional Statement - State Civil Case

David Skeen, Counsel
Of Record For Appellant
880 Lumber Exchange Bldg.
10 South 5th Street
Minneapolis, MN 55402
612/333-3343

Of Counsel:
Amy Silberberg,
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, MN 55414
612/378-2436

QUESTION PRESENTED

Did the Supreme Court of the State of Minnesota err in refusing to grant Appellant's Petition for a Writ of Prohibition which alleged that the Minnesota statutes providing for the recoupment of court-appointed attorney's fees were unconstitutionally applied to an acquitted defendant?*

TABLE OF CONTENTS

	<u>Page</u>
Question Presented	i
Table of Authorities	ii, iii
Opinion Below	1
Jurisdictional Grounds in this Court	1, 2
Constitutional and Statutory Provisions	2,3,4
Statement of the Case	4,5
Substantiality of the Questions Presented	5-11
Conclusion	11, 12

APPENDICES

- Appendix A - Order and Judgment Appealed From
- Appendix B - Petition for Writ of Prohibition
- Appendix C - Answer to Petition for Writ of Prohibition
- Appendix D - Notice of Appeal
- Appendix E - Affidavit of Thomas Robert Lacher
- Appendix F - Transcript of Court Proceedings,
October 1, 1982

* The parties to the proceeding in the Supreme Court of the State of Minnesota were the City of Bemidji, which did not file a responsive pleading, and the State of Minnesota, who filed an appearance on behalf of the Honorable Terrance C. Holter, Beltrami County Judge, the trial court judge.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Adamson v California</u> , 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947)	6
<u>Fuller v Oregon</u> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)	5,7,11
<u>Gideon v Wainwright</u> , 372 U.S. 335, 63 S.Ct. 792, 9 L.Ed.2d 799 (1963)	7,8
<u>Grannis v Ordean</u> , 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)	6,7
<u>James v Strange</u> , 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972)	5
<u>Olson v James</u> , 603 F.2d 150 (1979)	9
<u>Rochin v California</u> , 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)	6
<u>United States v Durka</u> , 490 F.2d 478 (1973)	9
<u>United States v Pinckney</u> , 491 F.Supp 82 (1980)	9
<u>State ex rel Brundage v Eide</u> , 83 Wash.2d 676, 521 P.2d 706 (1974)	9,10
<u>State v McCarthy</u> , 104 N.W.2d 673 (1960)	8
<u>Constitutional and Statutory Provisions</u>	
Fifth Amendment to the United States Constitution	2,6,7,10, 11
Sixth Amendment to the United States Constitution	2,7,9,10, 11
Fourteenth Amendment to the United States Constitution	2,6,7,10, 11
Minnesota Statutes Annotated, Section 611.07	8
Minnesota Statutes Annotated, Section 611.20	2,3,4
Minnesota Statutes Annotated, Section 611.35	3,4,10
Minnesota Statutes Annotated, Section 631.48	8
49, Minnesota Statutes Annotated, Rules of Criminal Procedure Section 5.02 (Supd. 5)	3,4
28 U.S.C. Section 3006A(f)	9
28 U.S.C. Section 1257(2)	2

Other Sources

	<u>Pages</u>
American Bar Association, Standards for Criminal Justice (1980) Standard 5-6.2	10
Op.Atty.Gen., 291e, August 1, 1935	6
Op.Atty.Gen., 199b-5, January 13, 1936	8
Op.Atty.Gen., 306b-3, fn-1, December 3, 1959	8
Op.Atty.Gen., 266b-7, May 25, 1967	8
Op.Atty.Gen., 799k, October 26, 1959	8

OPINION BELOW

The Order of the Minnesota Supreme Court filed on January 31, 1983, is set forth in the Appendix hereto. (Appendix No. A.)

JURISDICTION

This action was filed as an original jurisdiction matter in the Minnesota Supreme Court seeking a Writ of Prohibition to prohibit the Beltrami County Court from attempting to recoup court-appointed attorney's fees against an acquitted defendant. The petition was made on the basis that the statutes used to justify the action of the Beltrami County Court were repugnant to the Due Process clause of the Fifth Amendment to the Constitution of the United States and to the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Minnesota statutes do not specifically provide for the recoupment of court-appointed attorney's fees following a judgment of acquittal in a criminal case; do not distinguish between convicted and acquitted defendants for recoupment purposes; do not provide for the remittance of recoupment payments imposing a manifest hardship on an acquitted defendant; nor do they specifically provide for exemptions possessed by other civil debtors in Minnesota.

The constitutional question was timely raised by the Appellant in his Petition (Appendix B) filed with the Minnesota Supreme Court and the Answer of the State of Minnesota (Appendix C) on behalf of the Honorable Terrance C. Holter does not allege any jurisdictional defect in raising the constitutional issue.

The Minnesota Supreme Court denied the Appellant's petition for a Writ of Prohibition and Notice of Appeal was timely served on February 14, 1983. (Appendix D.)

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of Minnesota on appeal is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides as follows:

No person shall be held to answer to a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the Constitution of the United States provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States provides in Section I as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statutes Annotated, §611.20, provides as follows:

If at any time after the state public defender or a district public defender has been directed to act, the court having jurisdiction in the matter is satisfied that the defendant or other person is financially able to obtain counsel or to make partial payment for the representation, the court may terminate the appointment of the public defender, unless the person so represented is willing to pay therefor. If a public defender continues the representation, the court shall direct payment for such representation as the interests of justice may dictate. Any payments directed by the court shall be deposited with the clerk thereof and the clerk shall forthwith remit the amount thereof to the treasurer of the governmental unit chargeable with the compensation of such public defender for deposit in the treasury to the credit of the general fund of such governmental unit or units.

If at any time after his appointment a public defender should have reason to believe that a defendant is financially able to obtain counsel or to make partial payment for counsel, it shall be his duty to so advise the court so that appropriate action may be taken.

Minnesota Statutes Annotated, §611.35, provides as follows:

Subd. 1. Any person who is represented by a public defender or appointive counsel shall, if he is financially able to pay, reimburse the governmental unit chargeable with the compensation of such public defender or appointive counsel for the actual costs to the governmental unit in providing the services of the public defender or appointive counsel. The court in hearing such matter shall ascertain the amount of such costs to be charged to the defendant and shall direct reimbursement over a period of not to exceed six months, unless the court for good cause shown shall extend the period of reimbursement. If a term of probation is imposed as a part of a sentence, reimbursement of costs as required by this subdivision may be made a condition of probation.

Subd. 2. The county attorney may commence a civil action to recover such cost remaining unpaid at the expiration of six months unless the court has extended the reimbursement period and shall, if it appears that such recipient of public defender or appointive counsel services is about to leave the jurisdiction of the court or sell or otherwise dispose of assets out of which reimbursement may be obtained, commence such action forthwith. The county attorney may compromise and settle any claim for reimbursement with the approval of the court which heard the matter. No determination or action shall be taken later than two years after the termination of the duties of the public defender or appointive counsel.

The provisions of 49, Minnesota Statutes Annotated, Rules of Criminal Procedure, §5.02, Subd. 5, provide as follows:

Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of counsel for the defendant. The court may require a defendant, to the extent of his ability, to compensate the governmental unit charged with paying the expense of appointed counsel.

STATEMENT OF THE CASE

The Appellant was charged with the violation of City of Bemidji Municipal Ordinance No. 476, Defrauding An Innkeeper. On April 13, 1982, the Appellant appeared in Beltrami County Court and requested court-appointed counsel. Appellant also completed a financial inquiry form and a Judge of the Beltrami County Court ordered that Appellant was entitled to the services of an attorney without cost to himself on April 13, 1982. (Appendix E.) On September 21, 1982, a court trial was held before the Honorable Terrance C. Holter, and on October 1, 1982, the Judge found the Appellant not guilty. Also on October 1, 1982, this same Judge ordered the Appellant to reimburse the court for court-appointed attorney's fees in the amount of \$288.00. This order was made without a hearing or the court making a finding of the Appellant's present ability to pay for the services of his court-appointed attorney pursuant to Minnesota Statutes Annotated, §611.20, or §611.35, or in accordance with Rule 5.02, Subd. 5, of the Minnesota Rules of Criminal Procedure as previously set forth. (Appendix F, transcript of October 1, 1982, trial court proceedings.)

This is a case of first impression at the appellate level in Minnesota and there have been no cases in the United States which

have challenged the imposition of court-appointed attorney's fees upon acquitted defendants on Due Process grounds. This Court has spoken on the issue of whether or not an acquitted defendant is responsible for reimbursement of court-appointed attorney's fees to the appointing authority on Equal Protection grounds in James v Strange, 407 U.S. 128, 139, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972), and Fuller v Oregon, 417 U.S. 40, 49-50, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). In both cases, there is language which specifically states that court-appointed attorney's fees are not constitutionally valid when assessed against an acquitted defendant.

THE QUESTION IS SUBSTANTIAL

The issue of whether or not an acquitted defendant is responsible for reimbursement of his court-appointed attorney's fees to the appointing authority is a significant constitutional problem, and the Due Process issue is one of first impression. The substance of Appellant's position is that he was charged with a criminal offense and found not guilty, and the trial court violated his Due Process rights by entering a post-verdict order of recoupment.

In the case at bar, the Appellant was acquitted and, therefore, legally absolved of any criminal responsibility. The power of a trial court should never be used (or abused) to order recoupment of court appointed attorney's fees after acquittal. Logically there appears to be no rational basis to extend the power and authority of a court to post-verdict situations where the defendant is acquitted. The state has brought the criminal charges and has imposed its power upon the Appellant. A

recoupment order after a judgement of acquittal is nothing more than an additional court proceeding intended to penalize the defendant. If anything, fundamental fairness would dictate that after acquittal a defendant should be entitled to costs from the state for preparing and pursuing his defense and exercising his constitutional rights.

In Rochin v California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), this Court held that procedural Due Process prevents the government from engaging in activity that "shocks the conscience." In his opinion, Justice Frankfurter stated that the government must "in their prosecutions respect certain decencies of civilized conduct." (Id. at 173). A recoupment order against an acquitted defendant violates this constitutional mandate.

Justice Black dissenting in Adamson v California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) has argued that Due Process means only the procedural guarantees set forth in the Bill of Rights and disapproved of the "shock the conscience" test. But even using this standard, the action of the trial court in ordering reimbursement of court-appointed attorney's fees after a judgment of acquittal is outrageous conduct.

A related issue is what procedural safeguards did the Appellant possess in this case. Certainly the Appellant had the important Fifth and Fourteenth Amendment rights to be heard before incurring the loss of any kind. Grannis v Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). But here the trial court did not hold any evidentiary hearing to determine Appellant's ability to reimburse the Court for court-appointed attorney's fees. Such summary action by the trial court was a clear violation of the

Appellant's Due Process rights as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

The Appellant has had his property and liberty interests under the Fifth and Fourteenth Amendments violated by the order of the trial judge mandating reimbursement of court appointed attorney's fees. Not only has Appellant been ordered to reimburse the appointing authority for these costs, he has also received notice that a warrant for his arrest will issue if he does not pay the amount ordered. This action necessarily involves the possible imposition of contempt proceedings for non-payment. However, the Appellant is still in the same financial condition as he was on the day of his appointment (as evidenced by his affidavit now on file with this Court) and does not have sufficient funds to comply with the order. Nor should he be forced to comply with a constitutionally invalid Order.

In Gideon v Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this court held that the Sixth Amendment guarantees the right to counsel in all federal prosecutions, and this right has been held applicable to the states through the Fourteenth Amendment. This court has also stated in Fuller, supra at 52, that there is no "chilling" effect on an accused who accepts court-appointed counsel with the knowledge he may be liable for reimbursement of such costs after conviction. But the same may not be said of a person wrongly accused and subsequently acquitted of criminal charges. In this case, the Appellant was charged with a minor criminal offense and the probable sentence would have been a small fine. To successfully defend against the charges in this case attorney's fees totaled \$288.00, which was more than the

probable fine. To say that the potential of repayment of the court-appointed attorney's fees does not have a "chilling" effect on the financial decision of an indigent to request counsel is to ignore the economic reality of the poor. A potential recoupment order diminishes and violates the meaning and purpose of Gideon, especially for the acquitted defendant.

The order of the Minnesota Supreme Court does not set forth any reasoning in denying Appellant's Petition for Writ of Prohibition, and there are no previous appellate cases in Minnesota which have discussed the issue before the court. By analogy, costs in a Minnesota criminal proceeding may only be assessed against a convicted defendant pursuant to Minnesota Statutes Annotated, §631.48. This statute, and other similar Minnesota statutes, have been interpreted to mean that costs may not be assessed against an acquitted defendant. The Minnesota Attorney General has ruled in several opinions dating back to 1935 that costs may only be assessed against convicted defendants and not persons acquitted of the charges brought against them. Op. Atty. Gen., 291e, August 1, 1935; Op. Atty. Gen., 199b-5, January 13, 1936; Op. Atty. Gen., 306b-3, fn-1, December 3, 1959; and Op. Atty. Gen., 266b-7, May 25, 1967.

The Attorney General of Minnesota has also ruled that a county must pay the costs of court-appointed counsel pursuant to Minnesota Statutes Annotated, §611.07. Op. Atty. Gen., 779k, October 26, 1959. Additionally, a defendant may not be assessed the cost of jury fees in Minnesota. State v McCarthy, 104 N.W.2d 673, 679 (1960) because any such order has a "chilling effect" on the decision to assert the constitutional right to a jury trial.

This same reasoning applies to indigent defendants who are requesting court-appointed counsel.

There is also conflict between the federal judicial circuits regarding the federal recoupment statute set forth at 28 U.S.C. §3006A(f). The Seventh Circuit in United States v Durka, 490 F.2d 478 (1973), held that according to federal statutory law it is not an abuse of authority for a federal judge, within a reasonable time after judgment, to require a financially able defendant to partially repay the cost of court-appointed counsel under the federal recoupment statute. The United States District Court for the Western District of Missouri in United States v Pinckney, 491 F.Supp. 82 (1980), has also interpreted the federal recoupment statute to mean that there is no constitutional prohibition against requiring convicted persons to pay the cost of court-appointed counsel, and discusses the application of such a law to acquitted defendants. The Court suggests that an acquitted defendant may possibly be liable for reimbursement of court-appointed attorney's fees if his financial condition improves. However, the Tenth Circuit of Appeals in Olson v James, 603 F.2d 150, 155 (1979), interpreting a Kansas state statute, has stated that an acquitted defendant may not be ordered pursuant to the Sixth and Fourteenth Amendments to reimburse the state for court-appointed attorney's fees.

There is a similar state decision to the case now before the Court in State ex rel Brundage v Eide, 83 Wash.2d, 676, 521 P.2d 706 (1974). In that case, the Washington Supreme Court upheld a Writ of Prohibition issued by a Superior Court prohibiting an inferior District Court from enforcing an order requiring the

defendant to pay the fee of an attorney appointed to represent him at the time of arraignment, if the defendant could within six (6) months pay the fee without financial burden. (This order is virtually identical to the provisions of Minnesota Statutes Annotated §611.35.) The Court held that the defendant's Sixth Amendment right to the assistance of counsel is unconstitutionally impaired by requiring a defendant to pay the cost of his court-appointed attorney's fees.

In support of the position that an acquitted defendant should not be obligated to reimburse the appointing authority for court-appointed attorney's fees is the American Bar Association, Standards for Criminal Justice (1980), Standard 5-6.2, which provides as follows:

"The ability to pay part of the cost of adequate representation should not preclude eligibility. Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility."

In the Commentary following the Standard, a strong argument is set forth justifying the rationale for not requiring convicted defendants to reimburse the court. In the case before this Court, the defendant was acquitted of the charge. Presumably the policy argument advanced in support of the Standard and the rationale of the Commentary would have even greater importance and meaning in cases where the defendant was acquitted, since no legitimate goal may be advanced in justifying a recoupment order against an acquitted defendant.

It is difficult to justify on any constitutional basis the decision to impose a recoupment order for court-appointed

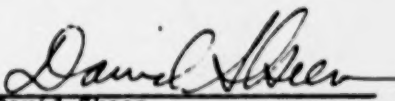
attorney's fees on an acquitted defendant, particularly since the state has brought the charges and proceeded with the prosecution. It is a denial of Due Process to impose a recoupment order on an acquitted defendant; to arbitrarily and capriciously impose a recoupment order on an acquitted defendant without a hearing; and a denial of Equal Protection according to the Fourteenth Amendment of the United States Constitution to impose a recoupment order for court-appointed attorney's fees on an acquitted defendant, especially without providing for the same exemptions that other civil debtors possess. But this is precisely what has happened in the case at bar. The Court should also be aware that the Appellant has been notified by the Beltrami County Court of further court proceedings for non-payment of the debt, and the possibility of contempt proceedings is a distinct possibility since the Appellant is indigent and cannot pay the amount ordered. This practice was specifically discussed in Fuller, supra, at 46, and disapproved of by this Court. Further court proceedings and the possibility of a contempt proceeding against an acquitted defendant certainly "shocks the conscience" of a reasonable individual.

CONCLUSION

The decision below upholding the unconstitutional Minnesota statutes should be summarily reversed and this Court should pronounce a rule that recoupment orders for court-appointed attorney's fees imposed against acquitted defendants are a violation of the Fifth, Sixth and Fourteenth Amendments of the

United States Constitution. For these reasons, this Court should
note probable jurisdiction.

Respectfully submitted,

By 
David Skeen
Volunteer Attorney for Appellant
On behalf of:
Minnesota Civil Liberties Union
880 Lumber Exchange Bldg.
10 South 5th Street
Minneapolis, MN 55402
612/333-3343

Of Counsel:
Amy Silberberg
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, MN 55414
612/378-2436

STATE OF MINNESOTA
IN SUPREME COURT

SUPREME COURT
FILED
JAN 31 1983

City of Bemidji,

Respondent,

C6-83-48 vs.

Thomas Lacher,

Petitioner.

JOHN MCCARTHY
CLERK

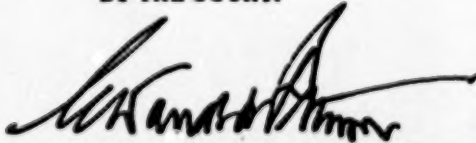
ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Thomas Lacher's petition for a writ of prohibition be, and the same is, denied.

Dated: January 28, 1983

BY THE COURT:

A handwritten signature in dark ink, appearing to read "H. Anderson", is written over a horizontal line.

Associate Justice

No. _____
STATE OF MINNESOTA
IN SUPREME COURT

City of Bemidji,

Plaintiff,

vs

PETITION FOR WRIT
OF PROHIBITION

Thomas Robert Lacher,

Defendant.

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Defendant, by and through his attorney, requests a Writ of Prohibition be issued by this Court on the following grounds:

1. On April 13, 1982, the Defendant appeared in Beltrami County Court charged with Defrauding an Innkeeper in violation of the City of Bemidji Municipal Ordinance No. 476. See clerk's docket entries marked as Exhibit No. 1. Counsel was apparently appointed by the Court to represent Defendant, since reimbursement for court-appointed attorney fees was later ordered.

2. On September 21, 1982, a Court trial was held before the Honorable Terrance C. Holter, and on October 1, 1982, the trial judge found the Defendant not guilty. See clerk's docket entries marked as Exhibit No. 1.

3. On October 1, 1982, the trial judge ordered the Defendant to reimburse the the Court for court-appointed attorney's fees in the amount of Two Hundred Eighty-Eight (\$288) Dollars, and that Defendant has paid Five (\$5) Dollars of said

amount on October 26, 1982. See clerk's docket entries marked as Exhibit No. 1.

4. The trial judge is without jurisdiction following a judgment of acquittal to order the recoupment of court-appointed attorney's fees.

5. Minnesota law does not specifically provide for the recoupment of court-appointed attorney's fees following a judgment of acquittal, does not distinguish between convicted and acquitted persons for recoupment purposes, nor does it provide for remittance of payments imposing a manifest hardship on an acquitted individual. [See 49 M.S.A., RCrP, §5.02 and M.S.A. §§611.14 to 611.20.] Further, that the defects in the statutes heretofore described violate the State and Federal constitutional rights of the Defendant. See James v Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L. Ed. 2d 600 (1972); Fuller v Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L. Ed. 2d 642 (1972); and, Olson v James, 603 F.2d 150, 154-155 (10th Cir. 1979 Kansas).

6. The Defendant is without sufficient funds to pay the amount ordered, and his financial condition has not changed since the original appointment of counsel. Further, that the Court has now threatened to imprison the Defendant on January 10, 1983, if all arrearages and amounts alleged due are not paid to the Court by that date.

7. The Defendant requests that the Supreme Court prohibit the Honorable Terrance C. Holter or any other judge of the Beltrami County Court from attempting to collect or from collecting recoupment for the court-appointed attorney's fees heretofore described and that this Court order a refund to Defendant of the Five (\$5) Dollars previously paid.

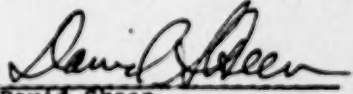
8. The Defendant requests the opportunity to file a brief and orally argue the merits of this case.

9. The Defendant requests that the Court issue an Interim Order staying all proceedings in the County Court of Beltrami County with respect to the Order of October 1, 1982. Further, that the Clerk of the Supreme Court of Minnesota orally notify the Honorable Terrance C. Holter, Judge of the Beltrami County Court, of the Court's Interim Order. Further, that the Defendant shall then forthwith serve a written copy of said Order on the Court and the attorney's for the City of Bemidji.

WHEREFORE, the Defendant prays that the Supreme Court of Minnesota issue a Writ of Prohibition restraining the Honorable Terrance C. Holter or any other judge of the Beltrami County Court from enforcing the order of October 1, 1982.

Dated this 10th day of January, 1983.

Respectfully submitted,

By 
David Skeen
Attorney for Defendant
and Volunteer Attorney for
MN Civil Liberties Union
880 Lumber Exchange Bldg.
10 South 5th Street
Minneapolis, MN 55402
612/333-3343

OF COUNSEL:

Amy Silberberg
MN Civil Liberties Union
628 Central Avenue
Minneapolis, MN 55414

**COUNTY COURT
COUNTY OF BELTRAMI
BEMIDJI, MINNESOTA**

No 54486

CITY OF BEMIDJI

vs.

Memorandum:

THOMAS ROBERT LACHER

Defendant

Address Burnsville (214A Pine Hall BSU)

Offense, Statute Ordinance 476

Defraud an Innkeeper

**Date of Offense 4/13/82 Arresting Authority
Russell/Henne BPD Jurisdiction City**

Bond Posted \$ Receipt No.

Plea of: Guilty Not Guilty ☒ Forfeit

Court/Jury Findings not guilty Date 10-1-82

Sentence: Fine \$ and/or Days

Court Appointed Attorney Fund \$ 288.00

Other pay \$40 each 30 days until paid.

Suspension

Condition of Suspension

Terms for Payment of Fine

Fine Paid \$ Receipt No. Date

4/13/82. Defendant charged by citation, present in court, requested time to consult an attorney. Continued to 4-16-82.

4/16/82. Defendant present in court with Attorney Dale Blanshan. A not guilty plea was entered with a request for a jury trial.

The matter was scheduled for the May Session. 5-3-82. Calendar Call - Case set as No. 6 on Tuesday, May 18.

5-18-82. Case continued to June Session as another case was for trial.

6-4-82. Calendar Call - Case set as No. 2 on Friday, June 25.

6-9-82. Rule 7.01 Notice.

6-18-82. Notice of Motion and Motion.

6-18-82. Hearing before the Honorable Terrance C. Holter. Appearing were Al Zdrazil for the City, Dale Blanshan for Thomas Lacher, and George Manning for Bruce Graber. Atty. Blanshan has brought motion to consolidate for trial this case and #54487. Atty. Manning joins in

motion. Court denies motion. Cases continued to August Session to be placed on consecutive days. Cassette 389, Meter 99-383.

NIKD →

- 7-30-82. Calendar Call - Case continued to September Session.
9-3-82. Calendar Call - Case set as No. 1 on Tuesday, September 21.
9-16-82. Subpoena issued to Patty Hasbrouck on behalf of City.
9-20-82. Subpoena issued to Kevin Haiby on behalf of City.
9-20-82. Subpoena of Patty Hasbrouck returned and filed.
9-21-82. Subpoena of Kevin Haiby returned and filed.
9-21-82. Court trial before the Honorable Terrance C. Holter. Representing the City was Al Zdrazil with Attorney Dale Blanshan appearing for and with the defendant. Court took the matter under advisement. Cassette 470, Meter 2496 - 3260; Cassette 471, Meter 0 - 2555.
9-21-82. City's Exhibit #1 - Perkins Ticket.
- 10-1-82. Atty. Blanshan and defendant present in court. Court finds defendant not guilty and imposed \$288 attorney fees.
10/26/82. \$5 part payment, R#16891.
10-27-82. Letter informing payments will be reduced to \$25 each month.

No. C6-83-48
STATE OF MINNESOTA
IN SUPREME COURT

City of Bemidji,
Plaintiff,

vs.

Thomas Robert Lacher,
Defendant.

ANSWER TO PETITION FOR
WRIT OF PROHIBITION

The Honorable Terrance C. Holter, for his Answer to the Petition for a Writ of Prohibition, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraphs 1, 2, and 3 of the Petition.

2. Denies the allegations contained in paragraphs 4 and 5 of the Petition.

3. With respect to paragraph 6 of the Petition, alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations that defendant-petitioner Thomas Robert Lacher is currently without sufficient funds to pay the amount ordered and that the financial condition of Mr. Lacher has not changed since the original appointment of counsel.

Furthermore, Judge Holter denies that "the Court . . . threatened to

imprison [Mr. Lacher] on January 10, 1983, if all arrearages and amounts alleged due are not paid to the Court by that date" but alleges that Deputy Clerk of Court Theresa A. Gunderson sent Mr. Lacher a letter in which she requested that he pay the amounts due or appear in court on January 10, 1983 to show cause why he has not paid the attorneys fees. (A copy of that letter is attached hereto as Exhibit A.) Judge Holter further alleges that Mr. Lacher has not paid the amounts due and did not appear in court on January 10, 1983, and that no warrant has been issued for his arrest.

4. Alleges that Minnesota law authorizes Beltrami County Court to require a defendant, to the extent of his ability, to pay attorneys' fees for a court-appointed attorney. Minn. Stat. §§ 611.14-20 and 611.35 (1982); Rule 5.02, subd. 5, Minn. R. Crim. P. These payments may be ordered following a judgment of acquittal, and they do not violate the state or federal constitutional rights of a defendant. See Fuller v. Oregon, 417 U.S. 40 (1974); United States v. Pinckney, 491 F. Supp. 82 (W.D. Mo. 1980); People v. Amor, 12 Cal.3d 20, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974).

5. Except as expressly admitted or otherwise qualified hereinabove, denies each and every allegation, matter, fact and thing contained in the Petition herein.

WHEREFORE, Judge Holter prays that petitioner take nothing by his Petition, that the Petition be denied and that Judge Holter be awarded his costs and disbursements herein.

Dated: January 20, 1983.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: Erica Jacobson
ERICA JACOBSON
Special Assistant
Attorney General

515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2654

Attorneys for the Honorable
Terrance C. Holter

**CLERK OF COURT
BELTRAMI COUNTY**

BEMIDJI, MINNESOTA 56601

P.O. BOX 367

218-751-7300

C. BUIFORD QUALLE

December 30, 1982

**Mr. Thomas R. Lacher
617 Tamarack Hall - BSU
Bemidji, MN 56601**

RE: Defrauding an Innkeeper - April 13, 1982.

Dear Mr. Lacher:

On October 1, 1982, you appeared in Beltrami County Court and were found not guilty of the above offense. On that day, however, the Court imposed attorney fees in the amount of \$288. These fees were to be paid at a rate of not less than \$25 each 30 days starting November 1, 1982.

To date, we have received \$5 towards these fees. However, you are behind in your payments by \$45 and your next payment of \$25 is due on January 1, 1983. Being as we have not received it as of yet, you must remit your \$45 to this office by January 10, 1983, or appear in court at 9:00 a.m. on that date to show cause why you have not paid these fees. If you fail to pay or appear on the date given a warrant for your apprehension will be issued.

Sincerely,

**Theresa A. Gunderson
Deputy Clerk of Court**

C-4

Exhibit A

116
4

IN THE SUPREME COURT OF THE STATE OF
MINNESOTA

Thomas Robert Lacher,

Appellant,

v

No. C6-83-48

City of Bemidji,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Thomas Lacher, the Appellant
above named, hereby appeals to the Supreme Court of the United
States from the final order of the Supreme Court of Minnesota
denying Appellant's Petition for a Writ of Prohibition, said Order
dated January 28, 1983, and filed by the Clerk of the Minnesota
Supreme Court on January 31, 1983.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

By David Sreen
David Sreen
Attorney for Appellant
880 Lumber Exchange Building
10 South 5th Street
Minneapolis, MN 55402
612/333-3343

Of Counsel:

Amy Silberberg,
MN Civil Liberties Union
629 Central Avenue
Minneapolis, MN 55414
612/378-2416

No.

IN THE SUPREME COURT OF THE UNITED
STATES

October Term, 1982

Thomas Robert Lacher,

Appellant,

v

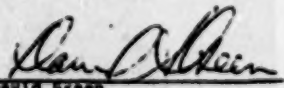
City of Bemidji,

Appellee.

Proof of Service

I, David Skeen, one of the attorneys for Thomas Robert Lacher, Appellant herein, hereby certify that on the 14th day of February, 1983, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties hereto, as follows:

1. On the City of Bemidji, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to: Mr. Al Idrazil, Bemidji City Attorney
City Hall Building
Bemidji, Minnesota 56601
2. On the State of Minnesota, by mailing a copy in a duly addressed envelope with first-class postage prepaid, to: Ms. Erica Jacobson, Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155, attorney for the Honorable Terrance C. Nolter, Beltrami County Judge
3. On John McCarthy, Clerk of the Minnesota Supreme Court, by mailing a copy in a duly addressed envelope with first-class postage prepaid, to: Mr. John McCarthy, Clerk of the MN Supreme Court
State Capitol Building
St. Paul, Minnesota 55155
4. On the Beltrami County Court, by mailing a copy in a duly addressed envelope with first-class postage prepaid, to: Clerk of the Beltrami County Court
Courthouse
Bemidji, Minnesota 56601


David Skeen
Attorney for Appellant
880 Lumber Exchange Bldg.
10 South 5th Street
Minneapolis, MN 55402
612/333-3343

FINANCIAL INQUIRY

STATE OF MINNESOTA)
COUNTY OF DELTA

I, Thomas Robert Auler, being first duly sworn voluntarily, on oath, depose and state that I am financially unable to employ an attorney to represent me in regard to the criminal charge or charges now pending against me and respectfully request the appointment of an attorney to represent me.

I understand that I am swearing to the truth of the following statements and that they are made and given under peril of the penalty of perjury, including a possible criminal charge and prison sentence, should any of my answers to the following inquiries be proven to be false.

I understand the Court may find at some future date that I am financially able to pay all or part of my attorney fees.

1. Full Name: Thomas Robert Auler

2. Address: 214 A Pine Hill Blvd

City: Brainerd State: MN

3. Telephone: 755-3144

4. Date of Birth: 11-13-42

5. If you are working at the present time, full time or part time, answer the following:

A. Name of Employer:

B. How long have you worked there?

C. Rate of Pay:

D. Hours worked per week:

E. Total earnings during the last 30 days:

F. Estimated total income in the last 6 months:

6. Do you have any income from sources other than employment, such as disability pensions, unemployment compensation, workmen's compensation, or income from stocks, bonds, royalties, etc.:

7. If answer to No. 6 is YES, then state what income and from what source:

8. If you are not presently employed when and where were you last employed:

JAPS PISON Printing mps. Summer 3-8

What was your rate of pay at your last place of employment:

4.50 per hr.

9. Name of your spouse, if any:
10. Name and age of dependents, if any:
11. Your spouse's place of employment, if any:
12. Your spouse's monthly wage or salary:
13. Has your spouse been employed in the last six months:
- A. If answer to No. 13 is YES, what was your spouse's rate of pay:
14. Do you have any bank accounts of any type: *yes at Minneapolis Fed*
15. If you have any bank accounts, whether checking or savings, state the name of the bank and the nature of the account and the balance in said account: *its roughly \$25 at Third City Federal*
16. Do you own any real or personal property (guns, cameras, boats, snowmobiles, motorcycles, Hi Fi equipment, chain saws, machinery, farm animals, etc.?) *a boat, purchased from grandmother with grand father died in 1978*
- If so, describe and state its value: *boat 1 motor 1,000*
17. Do you have any cash or pocket money: *yes \$60*
- If so, how much? *\$60*
18. Do you own or are you buying a home? *N/O*
- If so, answer the following:
- A. What is its estimated market value:
- B. State amount of any mortgage on said property and to whom owed:
19. Do you own an automobile:
- Make:
- Year:
- Model:
20. If automobile is mortgaged, state amount due and to whom:
21. Do you have or have you had any sources of income during the last calendar year not included in the answers of the above questions? *N/O*
22. List all of your indebtedness, indicating the total amount of the indebtedness and the basis for payment of a per month basis or per week basis:
23. Have your parents or anyone else indicated their willingness to employ an attorney for you? *N/O*
- If answer to No. 23 is affirmative, state the name and address of such person:

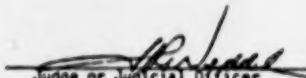
Thomas A. Larson
 Sign Name Here

TO BE FILLED OUT BY COURT PERSONNEL

Subscribed and sworn to before me this _____ day of _____,
19____.

ORDER

The Court has determined, based on the above Affidavit, that the Defendant (is - ~~is not~~) entitled to the services of an attorney without cost to himself, and the Court hereby appoints _____ to act for said Defendant.


Judge or Judicial Officer

Dated: 4-13-82

STATE OF MINNESOTA
COUNTY OF BELTRAMI

IN COUNTY COURT
CRIMINAL DIVISION

CITY OF BEMIDJI,

File No. 54486

Plaintiff,

-vs-

DEPUTY CLERK'S CERTIFICATE

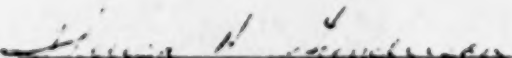
THOMAS ROBERT LACHER,

Defendant.

I, Theresa A. Gunderson, Deputy Clerk of County Court for Beltrami County, Criminal Division, do hereby certify that the following transcript of the above entitled action were electronically recorded and transcribed under my control and direction:

Cassette #477 Meters 1032 - 1127

Dated: January 12, 1983.



Theresa A. Gunderson

THE COURT: Mr. Blanshan, you're here on Thomas...

MR. BLANSHAN: Thomas Lacher.

THE COURT: After trial in that matter I have found the defendant not guilty, and on the record I find the defendant not guilty. How much court appointed attorney time do you have in this case?

MR. BLANSHAN: I have \$288, Your Honor.

THE COURT: All right, I impose Court appointed attorney fees in the amount of \$288, and defendant will be expected to pay those Court appointed attorney fees at the rate of \$40 per month until they are paid.

MR. BLANSHAN: Your Honor, there is just one thing that the defendant would like to check. According to the terms of his financial aid award he's--- any outside employment invalidates his award. There is a possibility that he may be able to get clearance from financial aids to have outside employment unless his loan forbids it. If he loses the loan, he loses his school entirely. So he'd like an opportunity to check on that and to confirm that.

THE COURT: All right, you can--if that creates some problem you can get back to me and we'll have to figure out some other way of handling it then.

MR. BLANSHAN: Thank you.

FILED

APR 7 1983

ALEXANDER L. STEVENS

CLERK

No. 82-6419

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS ROBERT LACHER,

Appellant,

VS.

CITY OF BEMIDJI,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

HUBERT H. HUMPHREY, III

Attorney General

ERICA JACOBSON

Special Assistant

Attorney General

515 Transportation Building

St. Paul, Minnesota 55155

Telephone: 612-296-2654

Counsel for the Honorable

Terrance C. Holter

TABLE OF CONTENTS

	Page
Motion To Dismiss Or Affirm	1
Questions Presented	1
Statement Of The Case	2
Argument	
I. Adequate Nonfederal Grounds Support The Decision Of The Minnesota Supreme Court.	3
II. Appellant Failed To Raise A Substantial Federal Question.	5
A. An Order Which Requires an Acquitted Defendant to Pay Attorneys Fees Does Not Violate Due Process.	5
B. Appellant's Arguments Regarding Procedural Due Process and Equal Protection Were Not Properly Raised and Are Frivolous.	9
Conclusion	11

TABLE OF AUTHORITIES

	Page
<i>Cases</i>	
<i>U.S. Supreme Court Cases:</i>	
Cardinale v. Louisiana, 394 U.S. 437 (1969)	9
Durley v. Mayo, 351 U.S. 277 (1956)	3
Fuller v. Oregon, 417 U.S. 40 (1974)	5, 6, 7, 8
James v. Strange, 407 U.S. 128 (1972)	5, 10
Rinaldi v. Yeager, 384 U.S. 305 (1966)	5
Stembridge v. Georgia, 343 U.S. 541 (1952)	3
Webb v. Webb, 451 U.S. 493 (1981)	9
<i>Other Federal Cases:</i>	
U.S. v. Durka, 490 F.2d 478 (7th Cir. 1973)	8
U.S. v. Pinckney, 491 F.Supp. 82 (W.D. Mo. 1980) ..	8
<i>Minnesota Supreme Court Cases:</i>	
Griggs, Cooper & Co., Inc. v. Lauer's, Inc., 264 Minn. 338, 119 N.W.2d 850 (1962)	3
Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970), cert. denied 404 U.S. 886 (1971)	3
Marine v. Whipple, 259 Minn. 18, 104 N.W.2d 657 (1960)	4
<i>Other States Case:</i>	
People v. Amor, 12 Cal. 3d. 20, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974)	8

Statutes and Rules

	Page
<i>Federal Statute:</i>	
18 U.S.C. § 3006A(f)	8
<i>Minnesota Statutes and Rule:</i>	
Minn. Stat. § 611.20 (1982)	2
Minn. Stat. § 611.35 (1982)	2
Minn. Stat. § 631.48 (1982)	8, 9
Rule 5.02, subd. 5 of the Minnesota Rules of Criminal Procedure	2
<i>Other States Statute:</i>	
Kan. Stat. § 22-4513(a)	10
<i>Other Source</i>	
American Bar Association's Standards for Criminal Justice, Standard 5-6.2	7

IN THE
Supreme Court of the United States

October Term, 1982

No. 82-6419

THOMAS ROBERT LACHER,

Appellant,

vs.

CITY OF BEMIDJI,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

The Honorable Terrance C. Holter moves the Court to dismiss the appeal herein or, in the alternative, to affirm the order of the Supreme Court of Minnesota. The grounds for this motion are that there are adequate nonfederal grounds for the decision below and that appellant has not presented a substantial federal question.

QUESTIONS PRESENTED

(1) Can adequate nonfederal grounds account for the Minnesota Supreme Court's denial of appellant's petition for a writ of prohibition?

(2) Does the United States Constitution prohibit a Minnesota county court from requiring an acquitted defendant to pay attorneys fees for his court-appointed attorney?

STATEMENT OF THE CASE

This is an appeal from an order of the Minnesota Supreme Court denying a petition for a writ of prohibition.

The matter arises out of a criminal trial before the Honorable Terrance C. Holter, a judge of Beltrami County Court in Minnesota. Appellant Lacher was the defendant therein. At Mr. Lacher's request and based upon a financial inquiry form he completed, the court appointed an attorney to represent Mr. Lacher. On October 1, 1982, Mr. Lacher was found not guilty. On that same date, pursuant to Minn. Stat. §§ 611.20 and 611.35 (1982) and Rule 5.02, subd. 5 of the Minnesota Rules of Criminal Procedure, Judge Holter issued an order requiring that Mr. Lacher reimburse the county for the attorneys fees of his court-appointed counsel (\$288).

On October 26, 1982, Mr. Lacher made a partial payment of \$5. The court then asked that he make monthly payments of not less than \$25 starting November 1, 1982. Mr. Lacher failed to make any further payments. On December 30, 1982, the Deputy Clerk of Court wrote to him requesting that he either pay the money which was then due or appear in court on January 10, 1983 to show cause why he had not paid the fees. Mr. Lacher did not pay the amount due or appear in court to challenge the payments or to explain his failure to make them. Instead, he filed with the Minnesota Supreme Court a petition for a writ of prohibition restraining Judge Holter from enforcing his order of October 1, 1982.

On January 28, 1983, the Minnesota Supreme Court denied the petition for a writ of prohibition. That order has now been appealed to this Court.

ARGUMENT

I. ADEQUATE NONFEDERAL GROUNDS SUPPORT THE DECISION OF THE MINNESOTA SUPREME COURT.

The decision of the Minnesota Supreme Court which is presently on appeal does not contain any opinion or statement of reasons. In order for this Court to hear the appeal, appellant must establish jurisdiction by showing that adequate non-federal grounds cannot account for the decision. *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). As shown below, appellant has failed to satisfy this requirement.

The state court may not have considered the federal constitutional issues and instead based its decision solely upon independent and adequate state grounds. Under Minnesota state law, a petition for a writ of prohibition may be denied without reaching the merits of any constitutional claims if the petitioner fails to establish the unusual circumstances which are required for the granting of such a writ. Indeed, it has long been the practice of the Minnesota Supreme Court (like many other courts) to avoid basing its decisions on constitutional grounds so long as there are adequate non-constitutional bases. See, e.g., *Head v. Special School Dist. No. 1*, 288 Minn. 496, 182 N.W.2d 887 (1970), *cert. denied* 404 U.S. 886 (1971).

According to the Minnesota Supreme Court, a writ of prohibition is an "extraordinary writ" which "issues in the discretion of the court only in extreme cases where the law provides no other adequate remedy . . ." *Griggs, Cooper & Co., Inc. v. Lauer's, Inc.*, 264 Minn. 338, 341, 119 N.W.2d 850, 852 (1962). To obtain the writ, a petitioner must show that a court is about to exercise unauthorized judicial power which will

result in injury for which there is no other adequate remedy. *Id.* If an appeal will give an adequate remedy, a writ of prohibition will not be issued. *See, e.g., Marine v. Whipple*, 259 Minn. 18, 104 N.W.2d 657 (1960).

In the instant matter, the Minnesota Supreme Court's discretionary denial of the petition for a writ of prohibition is supported by the existence of adequate alternative state court remedies. The Minnesota Supreme Court might have decided that Judge Holter's original order imposing attorneys fees could have been adequately reviewed on appeal. Furthermore, the Court could have concluded that an appeal would also be adequate to review any order issued after the hearing scheduled for Mr. Lacher to show cause why the fees were not being paid. That conclusion is eminently sensible in light of the fact that there is no indication that Judge Holter was even informed of Mr. Lacher's constitutional challenge. Furthermore, Mr. Lacher did not attend the January 10, 1983, county court hearing to contest the attorney's fees order or to explain his position. It is certainly plausible that, had he attended the January 10 hearing, he would have had an opportunity to persuade Judge Holter that his economic status necessitated a postponement or forgiveness of the attorney's fees. *Cf., Jurisdictional Statement at 4.* Instead, Mr. Lacher chose to by-pass normal procedures by seeking an extraordinary remedy that is simply not appropriate in these circumstances under Minnesota law.

Thus, it is likely that the decision of the Minnesota Supreme Court on review herein was based upon the extraordinary nature of a writ of prohibition, a nonfederal ground. Since the state court probably did not consider the federal constitutional issues in rendering its decision, this Court should decline jurisdiction and dismiss the appeal.

II. APPELLANT FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Even if this Court decides that the decision of the Minnesota Supreme Court was not based on an adequate nonfederal ground, it should dismiss or affirm for lack of a substantial federal question. Appellant suggests that the recoupment order violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Jurisdictional Statement at 2, 11. As shown below, the order requiring Mr. Lacher to pay attorneys' fees does not violate those provisions. Therefore, the appeal should be dismissed or the decision below affirmed.

A. An Order Which Requires an Acquitted Defendant to Pay Attorneys Fees Does Not Violate Due Process.

Appellant's main argument appears to be that the recoupment of attorneys fees from an acquitted defendant violates due process because it "shocks the conscience." Jurisdictional Statement at 5-6. Apparently, appellant believes that a recoupment order shocks the conscience because it chills the exercise of the right to counsel guaranteed by the Sixth and Fourteenth Amendments. Jurisdictional Statement at 7-8, 10. Based upon this Court's clear statements in *Fuller v. Oregon*, 417 U.S. 40 (1974) and *James v. Strange*, 407 U.S. 128 (1972), this argument should be summarily rejected.

In *James v. Strange*, 407 U.S. 128, 141 (1972), this Court recognized the legitimate and important state interests in recoupment statutes:

The Court assumed in *Rinaldi [v. Yeager]*, 384 U.S. 305 (1966)], *arguendo*, "that a legislature could validly provide for replenishing a county treasury from the pockets

of those who have directly benefited from county expenditures." *Id.*, at 309, 86 S.Ct. at 1500. We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged state and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.

(Footnotes omitted.)

Two years later, in *Fuller v. Oregon*, 417 U.S. 40 (1974), this Court rejected the argument that "a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus 'chill' his constitutional right to counsel." *Id.* at 51. The Court concluded that a defendant who might later be ordered to repay the costs of his court-appointed attorney is not deprived of his constitutional right to legal assistance, since he receives free counsel when he needs it. *Id.* at 52-53. As the Court explained:

We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise.

A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

Id. at 53-54. The Court therefore decided that properly drafted recoupment statutes do not unconstitutionally place a penalty on the exercise of a constitutional right, for they have valid purposes and require repayments only from persons who are able to do so. *Id.* at 54.

Thus, this Court has already determined that the right to counsel guaranteed by the Sixth and Fourteenth Amendments does not prohibit a state from enacting a recoupment statute.¹ Instead, these statutes serve legitimate state interests. Recoupment statutes, *per se*, are not so outrageous as to violate due process. *Cf.* Jurisdictional Statement at 5-6.

Appellant suggests, however, that the application of a recoupment statute to an *acquitted* defendant violates due process. Jurisdictional Statement at 5-6. The decisions of this Court do not support that position. The state interest in recoupment statutes set forth above at 5-6 applies to both convicted and acquitted defendants. Although the Oregon recoupment statute under consideration in *Fuller v. Oregon* applied only to convicted persons and the constitutionality of that

¹ In his argument against attorneys fees reimbursement statutes, appellant refers to the American Bar Association's Standards for Criminal Justice, Standard 5-6.2. Jurisdictional Statement at 10. However, the commentary following the standard makes clear that its recommendation against reimbursement is based upon policy considerations rather than constitutional requirements.

classification was upheld, the Court clearly did not hold, or even suggest, that such a limitation to convicted persons was constitutionally required. Furthermore, the comparison in *Fuller v. Oregon* between defendants who are just above the line of indigency and defendants only slightly poorer applies equally well to cases where a defendant is acquitted. See above at 6-7. A non-indigent defendant who is acquitted in a criminal case should not be placed in a worse economic position than someone like appellant.

The Minnesota recoupment provisions are not unusual in their application to all defendants. The federal reimbursement statute, 18 U.S.C. § 3006A(f), does not distinguish between convicted and acquitted persons. See *U.S. v. Durka*, 490 F.2d 478 (7th Cir. 1973) [An acquitted defendant was not deprived of his constitutional rights by an order to pay reimbursement for fees of court-appointed counsel]; *U. S. v. Pinckney*, 491 F.Supp. 82, 84 (W.D. Mo. 1980) ["Assuming good cause for prosecution, the court does not understand why a person who becomes financially able to pay counsel fees should enjoy a lifetime exemption from that obligation. The Federal statute makes no distinction between the successful and unsuccessful defense of prosecution."] The California statute has also been upheld by that state's highest court against a due process challenge to the fact that acquitted defendants may be required to pay reimbursement for counsel fees. *People v. Amor*, 12 Cal. 3d 20, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974).

Finally, appellant refers to Minn. Stat. § 631.48 (1982), which provides that the costs of prosecution may be assessed

against only those defendants who are convicted.² Jurisdictional Statement at 8. Obviously, the Minnesota Legislature could have made a similar restriction in the attorneys' fees reimbursement statutes. But, because of differences between the payment of attorneys fees and the payment of the costs of prosecution, the Minnesota Legislature chose not to limit the attorney reimbursement provisions to convicted defendants. Appellant has failed to establish that this choice violates his constitutional rights.

B. Appellant's Arguments Regarding Procedural Due Process and Equal Protection Were Not Properly Raised and Are Frivolous.

Appellant also suggests that proper hearings were not held and that the recoupment order violates his right to equal protection by failing to provide for the same exemptions that other civil debtors possess. Jurisdictional Statement at 1, 6, 11. Neither of these arguments was raised below. *See* Petition for Writ of prohibition, a copy of which is attached to the Jurisdictional Statement at B-1. Therefore, they should not be considered. *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

² Minn. Stat. § 631.48 (1982) provides:

In all criminal actions, *upon conviction of defendant*, in addition to the punishment prescribed and as a part of the sentence, the court may adjudge that defendant shall pay the whole or any part of the disbursements of the prosecution and payment thereof may be enforced in the same manner as the sentence, or by execution against property. When collected, such disbursements shall be paid into the treasury of the county, where conviction was had, but this shall not interfere with the payment of officers', witnesses', or jurors' fees.

(Emphasis added.)

Furthermore, the record does not support appellant's suggestion that he was denied procedural due process. The original order requiring Mr. Lacher to pay attorneys fees was apparently entered at a court hearing. *See* transcript attached to Jurisdictional Statement at F-2. Furthermore, appellant was later given a further hearing to show cause why he had not paid the fees. *See* letter attached to Answer to Petition for Writ of Prohibition, a copy of which is attached to Jurisdictional Statement at C-4. He voluntarily declined that opportunity by not attending the hearing.

Appellant has also failed to support his argument that the Minnesota recoupment statutes violate equal protection because they do not provide for the exemptions given to other civil debtors in Minnesota. The argument is apparently based on *James v. Strange*, 407 U.S. 128 (1972). However, the offending aspect of the Kansas statute in *James v. Strange* provided that, in an action to collect attorneys fees, "[n]one of the exemptions provided for in the code of civil procedure [for collection of other judgment debts] shall apply . . ." Kan. Stat. § 22-4513(a). The Minnesota statutes do not so provide. Since the defendants required to pay reimbursement for attorneys fees receive the same exemptions afforded to other debtors, the violation of equal protection found in *James v. Strange* does not exist in Minnesota. *See Fuller v. Oregon*, 417 U.S. 40, 46-48 (1974).

CONCLUSION

The decision of the Minnesota Supreme Court should not be reviewed by this Court because it is supported by adequate nonfederal grounds. Furthermore, appellant has not raised any substantial federal question to be decided by this Court.

We respectfully ask the Court to dismiss this appeal or, in the alternative, affirm the judgment entered by the Minnesota Supreme Court.

Dated: April 6, 1983.

Respectfully submitted,

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

By: ERICA JACOBSON

Special Assistant

Attorney General

515 Transportation Building

St. Paul, Minnesota 55155

Telephone: (612) 296-2654

Attorneys for the Honorable

Terrance C. Holter

10
No. 82-6419

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

Thomas Robert Lacher,

Appellant,

v

City of Bemidji,

Appellee.

On Appeal from the Supreme Court of Minnesota

Brief in Response to Appellee's Motion to Dismiss or Affirm

David Skeen, Counsel
Of Record For Appellant
880 Lumber Exchange Bldg.
10 South 5th Street
Minneapolis, MN 55402
612/333-3343

Of Counsel:
Amy Silberberg,
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, MN 55414
612/378-2436

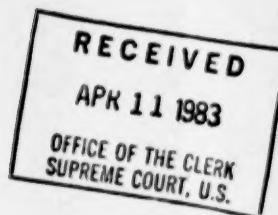


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	1
Statement of the Case	1
The Question is Substantial	2
Conclusion	6

TABLE OF AUTHORITIES

Cases

<u>Fuller v Oregon</u> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)	4, 5
<u>In Re Allen</u> , 71 Cal.2d 388, 455 P.2d 143 (1969) . . .	5
<u>James v Strange</u> , 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972)	4, 5
<u>People v Amor</u> , 12 Cal.3d 20, 523 P.2d 1173 (1974) . .	4, 5
<u>United States v Durka</u> , 490 P.2d 478 (1973)	4
<u>United States v Pinckney</u> , 491 F.Supp. 82 (W.D.Mo. 1980)	4

Constitutional and Statutory Provisions

Fifth Amendment to the United States Constitution . .	2
Sixth Amendment to the United States Constitution . .	2, 5
Fourteenth Amendment to the United States Constitution	2

Other Sources

12 Moore's Federal Practice §511.01, at 8-67 (2d. ed. 1982)	2
--	---

STATEMENT OF THE CASE

The Appellee misstates some of the factual background in this case. No indigent requests appointed counsel, it is a constitutional right required to be provided by the state. An accused qualifies for court-appointed counsel based on a lack of financial resources. It is the duty of a judge in Minnesota to make the determination of indigency based on the financial inquiry form and questioning of the accused regarding his resources. Court-appointed counsel is appointed by the judge only if the accused is eligible.

The record in this case is devoid of any basis for the Court's Order imposing the obligation to reimburse the appointing authority for court-appointed attorney's fees. The Appellee, however, cites three statutory provisions as the basis for the Order. In actual fact, the judge made no statement as to the grounds for his Order.

The Appellee makes much of the fact that the Appellant failed to appear on January 10, 1983, to contest the imposition of the court-appointed attorney's fees. Reference to the letter of the Court dated December 30, 1982, (Jurisdictional Statement C-4) indicates that the Court did not give the Appellant the choices stated by the Appellee. The letter makes it perfectly clear that failure to pay the amount stated in the letter would result in a warrant for the Appellant's arrest. Rather than face the possibility of imprisonment, the Appellant contacted legal counsel who prepared the Petition for Writ of Prohibition dated January 10, 1983, the date for response to the letter. This may only be construed as a response by the Appellant to the letter and does not

evidence a failure to appear or respond to the Court. In fact, the response was that the Court was violating the Appellant's constitutional rights and the Appellant was asserting a defense to the Court's action.

THE QUESTION IS SUBSTANTIAL

The Order of the Minnesota Supreme Court denying Appellant's Petition for a Writ of Prohibition did not specify the reason for such action. The Appellee now claims that the Minnesota Supreme Court did not consider federal constitution issues but instead based its decision solely upon independent and adequate state grounds. This conclusion is not supported by the facts and is an obvious attempt to construe the issues in a misleading manner.

The Appellant raised substantial federal constitutional issues in his Petition for a Writ of Prohibition and the Appellee responded to those federal constitutional issues in its Answer. No claim was made by the Appellee at that time that the issues presented by the Appellant involved merely state, as opposed to federal, constitutional issues.

The leading treatise on federal practice states that the United States Supreme Court, in cases where the basis of the state judgment is not clear and where the non-federal ground is not substantial or sufficient, may presume that the state court based its judgment on the law raising the federal constitutional question and invoke its jurisdiction. 12 Moore's Federal Practice §511.01, at 8-67 (2d Ed. 1982). In this case, the substantial issues are the defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Appellant did not raise any substantial state constitutional issue

in his Petition for a Writ of Prohibition or his Jurisdictional Statement, nor has the Appellee cited any substantial state constitutional argument which would supercede the substantial federal constitutional issues presented. For the state to now say that the federal constitutional issues were not the substantial issues before the Minnesota Supreme Court is a frivolous and incorrect statement.

The Appellee has argued that the Petitioner bypassed the "normal" procedures to seek an extraordinary remedy. Again, the Appellee has misstated the facts. The judge had already ordered the reimbursement of court-appointed attorney's fees without a hearing. The Appellant could only conclude from the letter sent to him on December 30, 1982, that the purpose of the hearing was not to determine whether or not he was still indigent but to show cause why he should not be imprisoned for non-payment of the amount ordered by the Court. To say that the Appellant bypassed "normal" procedures is simply a frivolous and incorrect argument.

The answer of the Appellant was to seek legal counsel and assert a defense to the Court's attempt to collect the fees. The extraordinary nature of a writ of prohibition is an appropriate remedy to stop the illegal actions of a court. In this case, the Appellant believed that the enforcement of the Order mandating reimbursement of the court-appointed attorney's fees was wrong and proceeded in the correct manner. The Minnesota Supreme Court had the same information before it and could also conclude that the Appellant was asserting a federal constitutional defense to the Order mandating the reimbursement of court-appointed attorney's fees.

The Appellee has also misstated the holding in Fuller v Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), James v Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972). In Fuller, the court stated that court-appointed attorney's fees should not be assessed against an acquitted defendant. Id. at 48-49 and 57.

The Appellee has also misstated the holdings in United States v Durka, 490 F.2d 478 (1973), and United States v Pinckney, 491 F.Supp. 82 (W.D.Mo. 1980). In Durka, the decision of the court was not based upon any constitutional basis but upon federal statutory authority. The Appellee misstates the holding as it relates to acquitted defendants by arguing otherwise. In Pinckney, there is no statement in the case which states that it is constitutionally correct to order acquitted individuals to reimburse the appointing authority for court-appointed attorney's fees. The Pinckney case merely discusses the theoretical application of such a law to acquitted defendants, suggesting that an acquitted defendant may possibly be liable for court-appointed attorney's fees if his condition improves. The court stated no basis for its theory.

In addition, the case in People v Amor, 12 Cal.3d 20, 523 P.2d 1173 (1974), was incorrectly used by the Appellee. The Amor decision applied to convicted defendants and not acquitted defendants. As to acquitted defendants, the court merely hypothesized that an order requiring an acquitted defendant to reimburse the state for court-appointed attorney's fees was not a punishment within the meaning of California law. Id. at 1178. No authority was cited for this hypothesis and one can only assume that the

court ignored the holdings in James and Fuller. In an earlier case, In Re Allen, 71 Cal.2d 388, 455 P.2d 143 (1969), this same Court held that the reimbursement of court-appointed attorney's fees as a condition of probation was a violation of the Sixth Amendment to the United States Constitution. It seems inconsistent to hold that a court cannot order reimbursement of court-appointed attorney's fees as a condition of probation, and then hypothesize that an acquitted defendant would be responsible for repayment for such fees. For the Appellee to cite the Amor case as authority for the proposition that acquitted defendants can be made to reimburse the appointing authority for court-appointed attorney's fees is a misstatement of the Amor decision.

The Appellee also states that the Appellant did not raise the equal protection issue below. This statement is false. Appellant asserted in his Petition for a Writ of Prohibition, Paragraph 5 (Jurisdictional Statement, B-2), that a violation of federal constitutional law existed and cited the James case. The holding in James provides that it is a denial of equal protection to deny convicted defendants, ordered to reimburse the appointing authority for court-appointed attorney's fees, the same exemptions as other civil debtors. Appellant properly raised the issue by citing the James case, and the exact language or form is not necessary.

It should also be noted that the State of Minnesota has not in the past recognized that defendant's may claim exemptions from paying court-appointed attorney's fees as other civil judgment debtors may claim such a right. The Court in this case did not even bother to inquire about the Appellant's ability to pay the amount ordered or whether the Appellant qualified for an exemption.

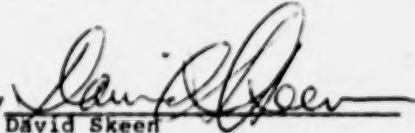
CONCLUSION

The Appellant raised substantial federal constitutional issues below and the State responded to those issues. Adequate federal constitutional grounds exist for the Court to note probable jurisdiction and proceed to determine this case on the merits.

Dated this 7th day of April, 1983.

Respectfully submitted,

By



David Skeen
Attorney for Defendant
and Volunteer Attorney for
MN Civil Liberties Union
880 Lumber Exchange Building
10 South 5th Street
Minneapolis, Minnesota 55402
612/333-3343

OF COUNSEL:

Amy Silberberg
MN Civil Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414